

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BAO XUYEN LE, as Personal  
Representative of the Estate of Tommy Le;  
HOAI “SUNNY” LE; and DIEU HO,

Plaintiffs,

v.

REVEREND DR. MARTIN LUTHER  
KING, JR. COUNTY; and KING  
COUNTY DEPUTY SHERIFF CESAR  
MOLINA,

Defendants.

C18-55 TSZ

ORDER FOR VIRTUAL  
CIVIL JURY TRIAL

THIS MATTER involves the June 14, 2017, fatal shooting of Tommy Le by King County Sheriff’s Deputy Cesar Molina. Tommy Le’s aunt, Bao Xuyen Le, who is the personal representative of his estate, has alleged the following claims against Molina and/or his employer, King County: (i) use of excessive force in violation of 42 U.S.C. § 1983; and (ii) negligence. *See* Plas.’ 2d Corrected 3d Am. Compl. (docket no. 234). Le’s parents, Hoai “Sunny” Le and Dieu Ho, bring claims under § 1983 for deprivation of their rights under the Fourteenth Amendment to the companionship and society of their son. *Id.*

1 This case was set for trial on June 10, 2019. Shortly before the trial date, on  
2 May 28, 2019, Molina and King County filed Notices of Appeal, docket nos. 191 and  
3 193, seeking review as to *inter alia* the Court's denial of qualified immunity. The trial  
4 date was stricken and the matter was stayed. See Order (docket no. 209). Over a year  
5 later, the United States Court of Appeals for the Ninth Circuit dismissed the appeals for  
6 lack of jurisdiction and concluded that they were frivolous. See Memo. (docket no. 224);  
7 Orders (docket nos. 230 & 231). In the meanwhile, efforts to reduce the spread of the  
8 pathogen that causes Coronavirus Disease 2019 ("COVID-19") had shuttered the  
9 courthouse, see General Orders 01-20, 02-20, & 03-20, and all in-person jury trials,  
10 criminal and civil, now remain suspended until at least March 31, 2021, see General  
11 Order 18-20. The Court anticipates that civil jury trials will not take place within the  
12 courthouse for several more months.

13 After the Ninth Circuit issued its mandate, and having reviewed the parties' Joint  
14 Status Report, docket no. 244, the Court set a trial date of April 19, 2021. See Minute  
15 Order (docket no. 245). During a subsequent status conference, which was conducted via  
16 the ZoomGov platform on October 15, 2020, the parties agreed to conduct jury selection  
17 by remote means. Minutes (docket no. 246). With regard to other portions of the trial,  
18 however, the parties dispute whether proceeding virtually is appropriate. King County  
19 and Molina object to the trial being held entirely on ZoomGov, and they propose to either  
20 continue the trial date to an unspecified time when this District might resume "normal"  
21 operations or to press forward with an in-person trial on the current trial date. Plaintiffs  
22 prefer to keep the current trial date and to present the testimony and other evidence, as  
23

well as the opening statements and closing arguments, virtually. Having reviewed the parties' briefs, docket nos. 268, 271, 275, 277, and 278, and having considered the oral arguments of counsel via ZoomGov on February 25, 2021, the Court issued a Minute Order, docket no. 279, indicating that trial in this matter shall be conducted remotely, commencing on April 19, 2021. This Order explains the Court's reasoning.

**A. Authority to Convene a Jury Trial By Remote Means**

The Court's analysis begins with the following proclamation:

Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers . . . and anywhere inside or outside the district.

Fed. R. Civ. P. 77(b). This rule does not define "open court" or "regular courtroom," and no authority construing these terms has come to the Court's attention. *See Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm.*, 470 F. Supp. 3d 735, 738 (E.D. Mich. 2020). Given, however, Rule 77(b)'s juxtaposition of "open court" as the manner of conducting trial with "chambers" in relation to other proceedings, the Court concludes that "open court" is not synonymous with a physical courtroom, but rather suggests that the public should ordinarily have access to a trial, as opposed to pre-trial activities. *See id.* at 739 (citing Black's Law Dictionary). This view is bolstered by the rule's inclusion of the phrase "in a regular courtroom," which would otherwise be superfluous. With respect to "a regular courtroom," Rule 77(b) sets forth the caveat "so far as convenient," which is in stark contrast to the imperative "must," used in connection with "open court," and which offers the flexibility to conduct trials in "non-traditional ways." *See id.* at 738-40; *see also Kieffaber v. Ethicon, Inc.*, No. 20-1177, 2021 WL 425822, at \*2 (D. Kan. Feb. 8, 2021);

1 Liu v. State Farm Mut. Auto. Ins. Co., --- F. Supp. 3d ---, 2020 WL 8465987, at \*1 (W.D.  
2 Wash. Dec. 17, 2020).

3 While Rule 77(b) contemplates that designated brick-and-mortar spaces might not  
4 be available or “convenient” for holding trials, a different court rule acknowledges that  
5 witnesses might not be able to provide testimony in person:

6 At trial, the witnesses’ testimony must be taken in open court unless a federal  
7 statute, the Federal Rules of Evidence, these rules, or other rules adopted by  
8 the Supreme Court provide otherwise. For good cause in compelling  
9 circumstances and with appropriate safeguards, the court may permit  
10 testimony in open court by contemporaneous transmission from a different  
11 location.

12 Fed. R. Civ. P. 43(a). This rule likewise contains no definition of the term “open court,”  
13 but its drafting history supports an understanding that the phrase has a functional rather  
14 than physical meaning. See Gould, 470 F. Supp. 3d at 738-39. Rule 43(a)’s reference to  
15 “open court” eschews an earlier practice of presenting evidence by way of affidavits or  
16 edited deposition transcripts in favor of “live” testimony, on the record, in proceedings  
17 that are open to the public. See id. The “open court” requirement serves two purposes:  
18 (i) ensuring that witness testimony may be tested by cross-examination, and (ii) allowing  
19 the trier of fact to observe the demeanor of the witness. See Kieffaber, 2021 WL 425822,  
20 at \*3 (citing In re Adair, 965 F.2d 777, 780 (9th Cir. 1992)). Videoconference platforms  
21 like ZoomGov adequately allow for cross-examination and the “near instantaneous  
22 transmission of testimony with no discernable difference” from “live” testimony allows  
23 jurors “to judge credibility unimpeded.” Liu, 2020 WL 8465987, at \*2. Nothing about a  
virtual jury trial is inconsistent with the principles underlying Rules 43(a) and 77(b), see  
Gould, 470 F. Supp. 3d at 739, and the Court concludes that it has the authority to require

1 the parties in this matter to try this case via remote means. *See Liu*, 2020 WL 8465987,  
2 at \*1; *see also Flores v. Town of Islip*, No. 18-cv-3549, 2020 WL 5211052, at \*1-2  
3 (E.D.N.Y. Sep. 1, 2020) (rejecting the notion that a party’s objection (or lack of consent)  
4 is dispositive on the issue of a virtual trial).

5 **B. Circumstances Necessitating Virtual Jury Trial**

6 Having determined that Rules 43(a) and 77(b) authorize a trial via ZoomGov, the  
7 Court must decide whether to exercise its discretion to proceed remotely over defendants’  
8 objections. In considering the issue, the Court will apply the more stringent standard of  
9 Rule 43(a), which requires “good cause in compelling circumstances” and “appropriate  
10 safeguards,” rather than the “convenience” rubric of Rule 77(b). To find the requisite  
11 “good cause” and “compelling circumstances,” the Court need look no farther than  
12 General Orders 01-20 and 02-20, which set forth the reasons for closing the courthouses  
13 in Seattle and Tacoma, and General Order 18-20, which articulated the basis for keeping  
14 the doors essentially shut through at least March 31, 2021.

15 This district was one of the first places in the nation to experience an outbreak of  
16 COVID-19, which is a severe and often fatal illness. *See* General Order 01-20. In  
17 February 2020, Washington State Governor Jay Inslee declared a state of emergency,  
18 *see* General Order 02-20, and even now, over a year later, indoor gatherings are curtailed  
19 and businesses are limited to 25% of their indoor capacity, *see* Healthy Washington –  
20 Roadmap to Recovery (Feb. 14, 2021) (available at [https://www.governor.wa.gov/issues/](https://www.governor.wa.gov/issues/issues/covid-19-resources/covid-19-reopening-guidance-businesses-and-workers)  
21 [issues/covid-19-resources/covid-19-reopening-guidance-businesses-and-workers](https://www.governor.wa.gov/issues/issues/covid-19-resources/covid-19-reopening-guidance-businesses-and-workers)).

22 Although the number of infections, hospitalizations, and deaths have recently declined,  
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1 and inoculation efforts are underway, the majority of the general public will not be fully  
2 vaccinated before the trial date in this matter, and social distancing remains a necessary  
3 component of our collective response to COVID-19. See General Order 18-20; see also  
4 Washington’s COVID-19 Vaccine Phases (indicating that Phase 2 of the vaccination  
5 process will not commence until sometime after April 26, 2021, and that information  
6 about Phases 3 and 4 is forthcoming) and COVID-19 Vaccine Prioritization Guidance  
7 and Interim Allocation Framework (Mar. 4, 2021) (defining Phase 2 as potentially  
8 including “critical” workers and certain disabled individuals, Phase 3 as targeting  
9 “essential” workers and youths, and Phase 4 as involving the remainder of Washington’s  
10 population) (both documents available at [https://www.doh.wa.gov/Emergencies/](https://www.doh.wa.gov/Emergencies/COVID19/VaccineInformation/AllocationandPrioritization)  
11 [COVID19/VaccineInformation/AllocationandPrioritization](https://www.doh.wa.gov/Emergencies/COVID19/VaccineInformation/AllocationandPrioritization)) (last visited Mar. 8, 2021);  
12 cf. Liu, 2020 WL 8465987, at \*2 (relying on an earlier prediction of May 2021 as the date  
13 by which inoculation of the general public might begin).

14 Defendants’ suggestion that, given the present conditions, the Court could proceed  
15 with an in-person jury trial as currently scheduled defies logic. Defendants’ alternative  
16 request that the trial date be continued until proceedings may safely be conducted in the  
17 courthouse is DENIED for the following reasons. This matter has been pending for  
18 over three years, since January 2018. It was ready for trial almost two years ago, in  
19 May 2019, before defendants took a frivolous interlocutory appeal to the Ninth Circuit.  
20 To the extent defendants believe that a virtual trial will be somehow inferior to a  
21 traditional one (a view that the Court does not share), defendants have only themselves to  
22 blame. Had they accepted the Court’s determination that questions of fact precluded  
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1 summary judgment on the issue of qualified immunity and not made misrepresentations  
2 to both this Court and the Ninth Circuit about the nature of their appeal, defendants could  
3 have had a trial in the Seattle courthouse in mid-2019, several months before the current  
4 pandemic started. In light of this procedural posture, the Court will not ask plaintiffs to  
5 wait another three to six months, or perhaps a year or more, to present their claims to a  
6 jury. *See Liu*, 2020 WL 8465987, at \*3.

7 Neither defendants nor the Court can predict when or in what manner a civil jury  
8 trial may be conducted in the courthouse. Defendants have suggested that, because  
9 criminal jury trials are currently proceeding in King County Superior Court, an in-person  
10 civil jury trial can be held immediately or within the near future in this district. This  
11 argument ignores the different rights at stake in criminal and civil matters, as well as the  
12 logistics of re-opening the doors at 700 Stewart Street. No criminal cases have been tried  
13 in this district for over a year, and when the court reconstitutes itself, criminal matters  
14 must be given priority over civil actions with respect to the summoning and selection of  
15 jurors and the commencement of trial. Dealing with the district-wide backlog of criminal  
16 proceedings would likely delay in an unpredictable fashion any in-person trial in this  
17 case.

18 Defendants' contention that the Court can simply return to business as usual is  
19 likewise unrealistic given what is known and unknown about the mutations of the  
20 pathogen that causes COVID-19, the effectiveness of the various vaccines against the  
21 different strains of the coronavirus, and the rates and mechanisms of infection among  
22 vaccinated and unvaccinated individuals. Even if "herd immunity" is eventually believed  
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1 to have been achieved, safe practices for the conduct of trial will likely include specific  
2 limitations on the number of people in a particular area (for example, the jury room) and  
3 other social distancing protocols, the use of personal protective equipment, and the  
4 implementation of methods to avoid the sharing of items like microphones and trial  
5 exhibits. Some of these practices might impact jurors' abilities to see the witnesses, view  
6 the physical evidence, and engage in deliberations, and thus, defendants cannot use as a  
7 baseline for comparison the way in which trials were handled pre-pandemic.

8       Having presided over two virtual trials in which the jurors deliberated to a verdict,  
9 the Court is persuaded that defendants' concerns regarding remote proceedings are  
10 unwarranted. The district's Virtual Trial Committee anticipated a number of defendants'  
11 fears and has addressed them. For example, to ensure that potential jurors are not  
12 precluded from participating in virtual trials by lack of access to the necessary equipment  
13 and/or connectivity, the district is prepared to loan out devices with cellular Internet  
14 service. *See Liu*, 2020 WL 8465987, at \*3. The Virtual Trial Committee's forethought  
15 and investment in such technology has significantly reduced the chances of inadvertently  
16 altering the demographics of the jury venire on socio-economic or similar bases. Indeed,  
17 the district has experienced a higher response rate to jury summonses in connection with  
18 remote trials than it has historically seen. This fact undermines defendants' assertion that  
19 an in-person trial will produce a more adequate spectrum of jurors. At least five of the  
20 27 potential jurors in the Court's most recent virtual trial resided more than a 90-minute  
21 drive away from the Seattle courthouse, and most, if not all, of them might have been less  
22 likely to participate had they been required to travel such distances, stay overnight in  
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1 nearby hotels and attempt to forage for food among the few open restaurants, and thereby  
2 face a greater risk than other jurors of becoming infected with the coronavirus and/or  
3 transmitting the disease to one or more members of their households. By insisting on an  
4 in-person trial, defendants propose to produce the very harm they wish to avoid, namely  
5 skewing the jury pool by inhibiting persons who reside outside the immediate radius of  
6 the courthouse from serving as jurors.

7 Defendants' speculation that individuals who serve on a jury remotely will be  
8 preoccupied with other matters, inattentive, distracted, or otherwise not focused on the  
9 testimony and other evidence is not consistent with the data acquired over the course of  
10 the virtual trials completed to date. Jurors are acutely aware that they can be seen in the  
11 gallery windows on the ZoomGov platform, and they are actually more likely to stay  
12 engaged during remote proceedings than they would during in-person trials. See Cara  
13 Salvatore, Law360 (Feb. 9, 2021), [https://www.law360.com/articles/1353728/clear-](https://www.law360.com/articles/1353728/clear-exhibits-abrupt-goodbyes-life-as-a-zoom-juror)  
14 [exhibits-abrupt-goodbyes-life-as-a-zoom-juror](https://www.law360.com/articles/1353728/clear-exhibits-abrupt-goodbyes-life-as-a-zoom-juror) [hereinafter "Law360"] (indicating that a  
15 recent juror described the virtual experience as better "in almost all respects" than his  
16 prior jury service in a courtroom, but identified as a "downside" that he "felt compelled  
17 to keep [his] face pointed at the camera the entire time so it was clear [he] was paying  
18 attention," whereas in a physical courtroom, he could "occasionally look around the room  
19 and out the windows").

20 Having foreseen defendants' objections, however, the Court has adopted "robust  
21 procedures" to "monitor jurors" and ensure that they remain connected to the ZoomGov  
22 session, are watching the proceedings, and do not show signs of fatigue or other distress.

1 See Liu, 2020 WL 8465987, at \*3. These protocols have successfully identified instances  
2 during which jurors unexpectedly lost connectivity and, as a result, the Court was able to  
3 halt the trial until the juror or jurors could be re-admitted to the virtual courtroom. These  
4 types of interruptions were much less prevalent in the more recent trial, perhaps as a  
5 function of improvements made by the videoconferencing platform and/or Internet  
6 service providers, but they are expected to occur, and the Court has the means and  
7 expertise to handle them. Of course, in-person trials also have their share of disruptions  
8 (for example, fire alarms or drills, illness of a participant, inclement weather, power  
9 failures, etc.), and litigants must be prepared to adjust accordingly regardless of how the  
10 proceedings are conducted.

11 Defendants also contend that virtual methods limit social interaction among jurors.  
12 In a feedback session after the Court's first remote trial, jurors identified this issue, and  
13 the Court has since taken steps to address it. As explained by a juror in the more recent  
14 trial:

15 The jury was asked to connect to the Zoom call up to 30 minutes prior to  
16 resumption of the trial each day. Clerks stated at least once that this was so  
17 that jurors could get to know each other. Items behind jurors (pets, posters,  
18 guitars, etc.) provided great starting points for conversation. Socialization  
wasn't as good over Zoom as it was for me in person at the prior trial, but  
the duration for this trial was much shorter, so that's expected. I feel like  
socialization was in a good place prior to deliberations.

19 Law360, supra. In this case as well, jurors will have an adequate opportunity to become  
20 acquainted prior to deliberations.

21 Defendants have expressed concerns about their counsel and litigation staff being  
22 in close quarters during the course of trial if the matter proceeds virtually. The Court  
23

1 does not understand how the interaction among counsel and litigation staff would be any  
2 different or safer if the proceedings occurred in a courtroom, in which counsel and  
3 litigation staff would congregate together, while perhaps also occasionally occupying one  
4 of the small, windowless conference rooms adjacent to the courtroom. A remote trial  
5 provides counsel and litigation staff the options of being in different rooms or buildings,  
6 and reduces their exposure to other individuals, including plaintiffs' attorneys and their  
7 assistants, witnesses, jurors, court staff, and security personnel.

8 Another issue raised by defendants involves the manner in which various King  
9 County Sheriff's deputies might wish to testify by, for example, physically demonstrating  
10 the actions they took on the day Tommy Le was killed. Defendants are encouraged to  
11 explore technological solutions. The attorneys in the most recent trial used multiple  
12 cameras with different lens types to either show an individual standing while speaking or  
13 zoom in on a tiny component of a physical piece of evidence. The litigants in the first  
14 trial played video-recorded footage of the scene of an accident, while asking a witness to  
15 narrate. Rather than diluting the impact of visual evidence, as defendants suggest,  
16 ZoomGov offers opportunities for presenting illustrative information in a more intimate  
17 way, and all counsel should consider the full range of possibilities.

18 With respect to the formality of the judicial process, defendants' assertion that  
19 virtual trials lack sufficient decorum has no merit. All participants, including the jurors,  
20 in the remote trials conducted to date have comported themselves in the same manner as  
21 they would were they in a physical courtroom. They have used the appropriate level of  
22 formality in addressing each other and the Court, and have taken seriously the oaths  
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1 sworn to serve as legal representatives for their clients, as witnesses, or as jurors. To  
2 uphold the dignity of the Court, the presiding judge has worn a robe, and court personnel  
3 have used, as backgrounds for their ZoomGov windows, depictions of the Court's bench,  
4 containing the district's seal and the flag of the United States. If anything, defendants'  
5 proposal to allow most witnesses to testify remotely, while a few testify in person, would  
6 detract from the decorum of the Court by suggesting that some witnesses (namely, those  
7 employed by King County) are more important than others. *See Guardant Health, Inc. v.*  
8 *Found. Med., Inc.*, No. 17-1616, 2020 WL 6120186, at \*2 (D. Del. Oct. 16, 2020).

9 Adopting such plan would unfairly prejudice plaintiffs, *see id.* at \*2 n.3, who raise  
10 legitimate concerns that jurors who were required to attend trial at the courthouse in the  
11 wake of COVID-19 might already feel resentment towards plaintiffs.

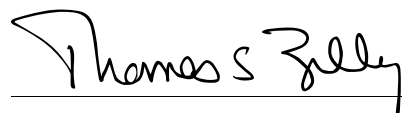
## 12 **Conclusion**

13 For the foregoing reasons, the Court has concluded that "good cause in compelling  
14 circumstances" justify conducting this trial via a videoconferencing platform, that  
15 "appropriate safeguards" for doing so are in place, and that a continuance of the trial date  
16 is unnecessary and would be prejudicial to plaintiffs. The applicable procedures and  
17 protocols for the virtual trial will be set forth in a separate order.

18 IT IS SO ORDERED.

19 The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

20 Dated this 8th day of March, 2021.

21 

22 Thomas S. Zilly  
23 United States District Judge